SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 121

L. L. MOORE,

Petitioner,

vs.

MEAD'S FINE BREAD COMPANY, A CORPORATION,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

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Opinions Below

The opinion of the Court of Appeals (R. 326-330) is reported at 208 F. 2d 777. Prior opinions in this cause are reported at 184 F. 2d 338, petition for writ of certiorari granted by Supreme Court, judgment of Court of Appeals vacated and cause remanded, 340 U. S. 944, 71 S. Ct. 528, 95 L. Ed. 681; and at 190 F. 2d 540, petition for certiorari denied, 342 U. S. 902, 72 S. Ct. 290, 96 L. Ed. 675. Petition

for certiorari was granted here in — U. S. —, 74 S. Ct. 877, 98 L. Ed. 727.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28 of the United States Code, § 1254(1). The Judgment of the Court of Appeals was entered on December 11, 1953 (R. 330). Petition for Rehearing was denied on January 16, 1954 (R. 356). The Petition for a Writ of Certiorari was filed on April 14, 1954. The Petition was granted June 7, 1954.

Statutes Involved

Section 2(a) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. A. § 13(a), provides in part:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States * * * and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * *."

And Section 3 of the Robinson-Patman Act, 49 Stat. 1528, 15 U. S. C. A. § 13a, provides in part:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, * * * to sell * * * goods in any part of the United States at prices lower than those exacted by said person elsewhere in

the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell * * * goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor."

And Section 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. A. § 15, provides in part:

"Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Questions Presented

1. Whether, in a case of price discrimination by a bakery corporation engaged in interstate commerce against a competing local bakery engaged solely in intrastate commerce where the jury and the appellate court found that the high-price leg of the discrimination occurred in interstate commerce and the low-price leg in intrastate commerce a cause of action constitutionally arose under Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act (38 Stat. 730; 49 Stat. 1526, 15 U. S. C. A. § 13(a)), where the effect may be to injure or destroy or prevent competition with the discriminator, or whether it is necessary that both the low-price and high-price leg of the price discrimination be in interstate commerce and that the injured competitor be in interstate commerce.

2. Whether under the facts stated above, where the purpose of the price discrimination is admittedly one of destroying competition or eliminating a local competitor, to be constitutionally actionable under the Borah-Van Nuys

Section of the Robinson-Patman Act (49 Stat. 1528, 15 U. S. C. A. § 13a), it is necessary that the means employed for the elimination of the competitor, that is, the low price sale or sale, be in interstate commerce or that interstate commerce be monopolized.

3. Whether it is the law of the case that the pleadings and proof make out a prima facie case for plaintiff, where, after a first trial in which the Complaint was dismissed at the close of plaintiff's case and the cause thereafter was first considered by the Court of Appeals, was remanded by this Court for further consideration, was reconsidered by the Court of Appeals, and certiorari was then denied by this Court, and a new trial was had on substantially identical issues of law and fact, and the cause is again considered by the Court of Appeals on the same issues with a reversal on issues previously argued in that Court and this.

Statement

This action was commenced on March 10, 1949, in the United States District Court for New Mexico. Petitioner, L. L. Moore, here charged Mead's Fine Bread Company, a New Mexico corporation, with price discrimination as between bread sales at Santa Rosa, New Mexico, and interstate sales (R. 5-8).

At the first trial of this action, the District Court dismissed the complaint at the conclusion of petitioner's case in chief. The Court of Appeals for the Tenth Circuit affirmed on the ground that petitioner was in pari delicto, 184 F. 2d 358, and this Court, granting certiorari, 340 U. S. 944, 71 S. Ct. 528, 95 L. Ed. 681, remanded the cause to the Court of Appeals for reconsideration in the light of *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U. S. 211, 71 S. Ct. 259, 95 L. Ed. 219. Acting upon this direction, the Court of Appeals reversed itself, and the District Court as well, and sent the case back for a new trial, 190 F. 2d 540.

Defendant Mead's Fine Bread Company, the respondent here, then sought certiorari, which was denied, 342 U. S. 902, 72 S. Ct. 290, 96 L. Ed. 675.

The cause was retried in the District Court in accordance with the second opinion of the Tenth Circuit. Petitioner, L. L. Moore, prevailed. The District Court's judgment (R. 32) in favor of petitioner was entered upon jury verdict and necessarily determined that Mead's Fine Bread Company had discriminated in price upon a geographical basis and that petitioner, L. L. Moore, had been injured by such discrimination in violation of federal statute.

Petitioner had engaged in the bakery business for eighteen years before commencement of this action. (R. 39) In 1940 he moved to Santa Rosa, New Mexico, and opened a bakery there. (R. 39) Early in 1943 petitioner entered the armed forces and in late 1945 he returned to reopen his bakery business at Santa Rosa. (R. 40) He then purchased additional equipment and modernized his plant in order to produce the new high-speed loaf of bread prevalent in his industry. (R. 43) By 1947 the value of petitioner's plant and going concern was $23,459.34. (R. 44) The actual physical value of the equipment was $20,000.00. (R. 160). This was not controverted.

In January, 1948, respondent, Mead's Fine Bread Company, entered the market and commenced trucking bread into Santa Rosa. (R. 48, 74) Mead's Fine Bread Company is a corporation which maintains its plant at Clovis, New Mexico. (R. 131) Its business lies athwart the Texas-New Mexico line. (R. 125, 133, 134) Through interlocking ownership and directorates, held by the Mead family and associates, it is a part of an interstate bakery business consisting of five corporations most of whose stockholders live in Texas, only one living in New Mexico, and which maintain plants in Lubbock and Big Spring, Texas, and in

Hobbs, Rosewell, and Clovis, New Mexico. (R. 124-135) All of these plants market their bread under the same trade-name, "Mead's Fine Bread", which is extensively advertised at great cost through a common program in West Texas and Eastern New Mexico by radio, motion pictures, billboard, and newspaper. (R. 135-137, 146-150, 249-251; Pl. Ex. 2, 3, 4, 6 to the deposition of Rex Webster; R. 149, 253; (R. 149, 255; R. 150, 257; R. 152, 259) This multistate aggregation of plants purchases flour and bread wrappers as a unit. (R. 135, 136; Pl. Ex. 3; R. 169, 279; Pl. Ex. 4; R. 169, 283) There are also Mead bakeries at Amarillo, Wichita Falls, San Angelo, El Paso and Abilene, Texas; Lawton, Oklahoma; and Albuquerque, New Mexico, all owned by close relatives of the majority stockholders of the five corporations mentioned above, and all using the same trade name and bread wrappers. (R. 133-136)

In 1948 petitioner decided that he would be better off if he moved to Tucumcari, New Mexico. (R. 76) However, after a group of business men had asked him if he would stay if all the merchants agreed to patronize him, he decided that he would stay if the merchants of Santa Rosa would support him one hundred per cent. (R. 77) These business men then circulated a petition to this effect. (R. 77, 86, 88) Petitioner had nothing to do with the petition or the decision of the business men of Santa Rosa to support him, and there is nothing in the evidence to indicate otherwise. He did accept the benefit of the support offered for the brief time it was available. After petitioner had been notified that the people of Santa Rosa would support him, he decided that it would be better for him to stay in Santa Rosa rather than going to the expense of moving into any new territory. (R. 84)

On September 3, 1948, contemporaneous with the unsolicited offer of merchants in Santa Rosa to patronize peti-

tioner one hundred per cent, respondent Mead cut the wholesale price of white sliced bread in Santa Rosa, New Mexico, from 14 cents to 7 cents for a pound loaf and from 21 cents to 11 cents for a loaf weighing one and one-half pounds. (R. 9, 48, 143, 144, 166) This price cut was ordered by Mead from Lubbock, Texas. (R. 142, 143, 165, 166) The price of bread at Santa Rosa prior to Mead's price cutting was the same as prevailed in all of Eastern New Mexico and West Texas. (R. 47, 126, 165) Mead did not cut the price of bread in any other area. (R. 166) It is admitted that these low prices were far below the cost of production and sale. (R. 166) On the windows of Santa Rosa stores Mead painted signs telling of the price cut which was reflected in reduced retail prices. (R. 167) Mead continued these low prices in effect at Santa Rosa until April 26, 1949, about six weeks after petitioner filed this suit. (R. 48, 145, 166)

It was stipulated that out of its Clovis, New Mexico plant respondent Mead operated a bread truck route to serve customers in Farwell, Texas, from September 18, 1946, to January 16, 1948, and from December 27, 1948, until the winter of 1951. (R. 131, 132) These were regularly scheduled deliveries. (R. 131, 132) Interstate shipments and sales by respondent under these regularly scheduled deliveries during the price war were made at the higher prices which respondent maintained in effect in all areas outside of Santa Rosa. (R. 47, 126, 131, 132, 166) The Mead orgainization also ships bread from Texas into New Mexico on a stand-by basis in the event of plant breakdowns in New Mexico. (R. 142)

Petitioner, L. L. Moore, found it impossible to meet the prices imposed by Mead. The losses sustained during this period finally forced him to close his business on February 28, 1950. (R. 49, 56, 57, 118, 119)

Petitioner's damages were extensive. The damages sustained involved loss of business, i. e., the physical plant and loss of profits. (R. 8) Petitioner testified that the value of his physical plant was $15,559.34. (R. 43) The physical value of his plant and going concern value was $23,459.34. (R. 44) That petitioner's testimony was conservative and justified is borne out by the valuation of $20,000.00 placed on the physical equipment by Mr. Lehn Englehart, a witness with extensive experience in the bakery business in New Mexico. (R. 160) Both Mr. Englehart and petitioner agreed that the value of the physical equipment rose, rather than depreciated, from 1947 to the middle of 1951. (R. 44, 161) Mr. Englehart was disinterested and exceptionally well qualified to value petitioner's plant, having been in the bakery business since 1917. He had seen petitioner's plant and had bought and sold similar equipment. (R. 154, 155, 159) Respondent did not offer any testimony at all to controvert the valuation of the physical plant at $20,000.00. Petitioner, with eighteen years experience in the bakery business, stated that in the town of Santa Rosa the customary profit of a bread bakery business like his would be ten per cent of the gross sales. (R. 71, 73) Mr. Englehart from his broad experience stated that in 1948 and 1949 a bakery of the kind or character of petitioner's and in a similar territory would have a profit of ten to twelve per cent of its gross sales. (R. 156, 157) Plaintiff's Exhibit 1 shows clearly that petitioner's bread sales were rising until respondent cut the price, and when the price was restored to normal, his sales again rose. (Pl. Ex. 1; R. 51, 53, 277) When the price cut of respondent went into effect, he had attempted to offset it by establishing truck routes which were expensive, and although he succeeded in increasing his gross, his net income continued to fall because of increased cost of sales to such route customers as he was able to ob-

tain elsewhere and because of his losses in Santa Rosa where he previously made his best profit. (R. 56, 118, 119)

The cause was submitted to the jury which returned a verdict of $19,000.00 damages against Mead's Fine Bread Company in favor of L. L. Moore, the petitioner here. (R. 14). District Judge Carl A. Hatch trebled the damages determined by the jury and granted judgment to petitioner in the sum of $57,000.00. Attorney's fees were fixed at $11,400.00. (R. 32)

Summary of Argument

This is a case of importance in the application of Section 2 of the Clayton Act, 49 Stat. 1526, 15 U. S. C. A. § 13, to the protection of small intrastate competitors from ruinous geographic price-cutting by concerns engaged in interstate commerce.

The decision of the Court of Appeals conflicts squarely with a decision of this Court, *Corn Products Refining Co.* v. *F. T. C.*, 324 U. S. 726, 65 S. Ct. 961, 89 L. Ed. 1320, and with a pre-Robinson-Patman Act case, *Porto Rican American Tobacco Co.* v. *American Tobacco Co.*, 30 F. 2d 234, c. d., 279 U. S. 858, 49 S. Ct. 353, 73 L. Ed. 999, decided by the Second Circuit under the original Clayton Act.

This is a classic case of territorial price discrimination. Despite the clear language of the statute and the precedents of the two cases cited above, the Court of Appeals for the Tenth Circuit refused to apply the Robinson-Patman Act to the case at bar even though the high-price leg of the discrimination was admittedly in interstate commerce. The Court of Appeals also asserted that the Robinson-Patman Act could not be constitutionally applied to the case at bar. The Court of Appeals erroneously engrafted into the statute the pseudo-requirement that there can be no violation of the Robinson-Patman Act "if the competitive injury . . .

was to a purely local competitor whose business was in no way related to interstate commerce". (R. 329)

Here one "leg" of the discrimination was in interstate commerce, *i. e.*, Mead's sold bread in Farwell, Texas, from its Clovis, New Mexico plant at double its price for the same kind of bread in Santa Rosa, New Mexico, where it was in competition with petitioner, in direct violation of the Act. Under the Act it is immaterial whether the low-price leg was in intrastate or interstate commerce. The prime purpose of the Act is, as its very language discloses, to forbid a concern engaged in interstate commerce to cut prices in any locality while holding them up elsewhere—an old and infamous device of monopoly. The erroneous decision of the Court of Appeals also imposes the anomalous requirement that the injured competitor himself must be in interstate commerce, apparently on the theory that only the elimination of an interstate competitor could "possibly" or "probably" have an effect on interstate commerce.

In the case at bar we *do* have the actual statutory effect pleaded and proved—the injury and elimination of petitioner as a competitor. The court below apparently lost sight of the fact that the Act applies where the effect "*may be* substantially to lessen competition or tend to create a monopoly in any line of commerce, *or prevent competition with any person who . . . grants . . . such discrimination . . .*" (Emphasis supplied) 49 Stat. 1526, 15 U.S.C.A. § 13(a). It also ignored the effect of the price action on the *discriminator*—Mead's Fine Bread Company—an interstate competitor which measurably extended its domain by its illegal acts at Santa Rosa, New Mexico.

In holding that the Commerce Clause of the Constitution itself would not permit the application of the Robinson-Patman Act to a case like the one at bar, the Court of Appeals has in effect declared the Act unconstitutional

insofar as it seeks to protect intrastate competitors from price discrimination by concerns engaged in interstate commerce. No principle of anti-trust law is more firmly established than that power of the Congress over interstate commerce is plenary, even extending to intrastate transactions by interstate operators where there is a possibility of an effect on the latter. That power has been exercised to the fullest extent in the Robinson-Patman Act.

The discriminations here complained of were in reality part and parcel of interstate commerce, even though respondent's plant was located in the same state in which the price discrimination took place, due to the fact that respondent is part of an interstate combination of five corporations operated as a unit behind a facade of separate corporate entities.

In the course of the long and peculiar history of this case the appellate courts have heretofore necessarily considered whether the petitioner had pleaded and proved a prima facie case at the first trial, and in this second appeal, upon the same issues of law and fact and substantially the same evidence, the "law of the case" doctrine should impel an appellate court to reach the same decision on the same issues involved in this appeal.

Argument

I. A PRICE CUT TO BELOW COST OF PRODUCTION IN ONE SEGMENT OF MEAD'S MARKET UNDER THE EVIDENCE ESTABLISHED A PRICE DIFFERENTIAL IN INTERSTATE COMMERCE IN VIOLATION OF THE SPECIFIC WORDS OF THE ROBINSON-PATMAN ACT AS CONSTITUTIONALLY APPLIED.

A. Petitioner Is Specifically Protected Against Injury From Mead's Blanket Price Cut In Santa Rosa, For Such Geographical Price Discrimination Is Prohibited By The Robinson-Patman Act And Is Within The Intent And The Power Of Congress.

The injury and destruction of small businesses through price cutting in local areas by large interstate firms first caught the attention of Congress in the now-famous Standard of New Jersey case, decided in 1911. In *Standard Oil Company of New Jersey* v. *United States*, 221 U. S. 1, 31 S. Ct. 502, 55 L. Ed. 619, one of the charges under the Sherman Act was that the defendants "sold their products at times and places where there was competition below remunerative prices, and recouped their losses by selling such products at high prices at other times and places." *United States* v. *Standard Oil Co.*, 173 F. 177, 190 (C.C.E.D. Mo., 1909). That case under the Sherman Act foreshadowed the passage of the Clayton Act in 1914 and spotlighted the urgent need for legislation to protect the small seller. In 1913 the Honorable Louis D. Brandeis effectively pointed to the need for additional legislation:

> "Americans should be under no illusions as to the value or effect of price-cutting. It has been a most potent weapon of monopoly—a means of killing the small rival to which the great trusts have resorted most frequently. It is so simple, so effective. Farseeing organized capital secures by this means the cooperation of the shortsighted unorganized consumer to his own undoing. Thoughtless or weak, he yields to the temptation of trifling immediate gain, and selling his birthright for a mess of pottage, becomes himself an instrument of monopoly." Harper's Weekly, Vol. LVIII, No. 2969, Nov. 15, 1913, p. 10-12, Cutthroat Prices—The Competition That Kills, Hon. Louis D. Brandeis.

On May 6, 1914, Mr. Clayton, Chairman of the Committee on the Judiciary, House of Representatives, submitted his committee's report upon a new bill, H. R. Rep. No. 627, 63rd Cong., 2d Sess. (1914). This was the first version of what was to become the Clayton Act. The committee report states in part at page 7:

"Section 2 of the bill is intended to prevent unfair discriminations. It is expressly designed with the view of correcting and forbidding a common and widespread unfair trade practice whereby certain great corporations and also certain smaller concerns which seek to secure a monopoly in trade and commerce by aping the methods of the great corporations, have heretofore endeavored to destroy competition and render unprofitable the business of competitors *by selling their goods*, wares, and merchandise *at a less price in the particular communities where their rivals are engaged in business than at other places throughout the country* . . . In the past it has been a most common practice of great and powerful combinations engaged in commerce —notably the Standard Oil Co., and the American Tobacco Co., and others of less notoriety, but of great influence—*to lower prices* of their commodities, oftentimes below the cost of production *in certain communities* and sectio ns where they had competition." (Emphasis added.)

Congress thus outlawed the act of discrimination in order to reach blanket price cutting in local areas by national concerns. As the Second Circuit stated in *Mennen Co.* v. *F. T. C.*,[1] 288 F. 774, 778-779 (CCA 2d, 1923):

"It is a matter of common knowledge that prior to the enactment of the Clayton Act a practice had prevailed among large corporations of lowering *the prices* asked for their products *in a particular locality* in which their competitors were operating . . . Such lowering of prices was maintained within the particular locality while the normal or higher prices were maintained in the rest of the country; and this practice was continued until the smaller rival was driven out of business, whereupon the prices in that locality would

[1] Despite its recognition of the legislative history in the *Mennen* case, the Second Circuit failed to give full effect to the statute. The case was later overruled in *Fan Camp & Sons* v. *American Can Co.*, 278 U. S. 245, 49 S. Ct. 112, 73 L. Ed. 311, 60 A. L. R. 1060 (1929).

be put back to the normal level maintained in the rest of the country. The Clayton Act was aimed at that evil." (Emphasis added.)

Manifestly, territorial price discrimination was the principal target of the Congress of 1914. Congress sought to afford protection to small local sellers competing with large national sellers. Section 2 of the Clayton Act, 38 Stat. 730, was placed in our federal statute books with the principal purpose of preventing the use of the potent weapon of geographical price cutting. In the Clayton Act federal power reaches this illegal practice by declaring territorial price discrimination to be unlawful. By definition, territorial price discrimination involves sales to non-competing purchasers. Rarely, if ever, would such purchasers compete with each other, since they are located in cities or areas far apart but which are served by the same seller.

For twenty-two years the Clayton Act remained unchanged. Then in 1936 the Robinson-Patman Act brought changes in the law for the especial protection of *individual sellers*. The Robinson-Patman Act broadened the Clayton Act to make doubly sure that small individual sellers were protected against blanket local price cutting. 49 Stat. 1526, 15 U.S.C.A. § 13. The Clayton Act was ambiguous as to whether lessening of competition in general had to be shown before an individual seller could find protection under the statute. The important Robinson-Patman amendment made certain that injury to an individual competitor is encompassed by the statute. The Senate Committee Report on the Act said that the original Clayton Act had been

". . . too restrictive, in requiring a showing of general injury to competitive conditions in the line of commerce concerned; whereas *the more immediately important concern is in injury to the competitor victimized*

> *by the discrimination.* Only through such injuries, in fact, can the larger general injury result, and to catch the weed in the seed will keep it from coming to flower." Sen. Rep. No. 1502, 74th Cong., 2d Sess. (1936) 4. (Emphasis added.)

In similar language the House Committee Report emphasized this strengthening of the statute. H. R. Rep. No. 2287, 74th Cong., 2d Sess. (1936) 8. Both the legislative history and the language of the statute make unmistakably clear that a discriminator's individual competitors are protected against illegal price differentials. Thus in *F. T. C. v. Morton Salt Co.*, 334 U. S. 37, 48, 68 S. Ct. 822, 829, 92 L. Ed. 1196, 1205 (1948), this Court stated the question to be "whether the differential works an injury to a *competitor.*" (Emphasis added.) This Court further specifically stated (334 U. S. 37, 49, 68 S. Ct. 822, 830, 92 L. Ed. 1196, 1206):

> "The new provision, here controlling, was intended to justify a finding of injury to competition by a showing of 'injury to the competitor victimized by the discrimination.'" (Emphasis added.)

As this Court further stated in the *Morton Salt* case (334 U. S. 37, 49, 68 S. Ct. 822, 830, 92 L. Ed. 1196, 1206, the Robinson-Patman Act specifically changed the old Clayton Act because there had been a widespread "belief that § 2 of the Clayton Act had 'been too restrictive in requiring a showing of *general injury to competitive conditions* . . .'"

Accordingly, the Court of Appeals correctly recognized in the case at bar that "the victim may maintain an action for damages *without* showing that the competitive injury was *general* in its scope and effect." (Emphasis added.) (R. 328.) Yet the same court erroneously proceeded to rule that the injuries sustained by L. L. Moore, petitioner here, were not actionable because the "purely local price cutting

war did not affect any line of commerce . . . ." (R. 330.) Nevertheless, respondent, Mead's Fine Bread Company, admittedly did engage in price differentials between Texas and New Mexico as shown by their stipulation (R. 131, 132).

Significantly, legislative history also makes it clear that by enactment of the Robinson Patman Act the Congress intended to tighten the fabric of the Clayton Act through restriction of defenses to charges of violation of the Act. As Senator Logan stated:

> "The purpose of this bill is to stop up loopholes found in Section 2 of the Clayton Act." 80 Cong. Rec. (1936) 3119.

Hence, the Clayton Act, as strengthened by the Robinson-Patman Act, is geared to prevent territorial price discrimination through price cutting in local areas, to protect individual sellers from such blanket price cutting, and to eliminate the abuses which had grown up under defenses asserted to Clayton Act violations.

But the Court of Appeals lost sight of the basic purpose of the Robinson-Patman Act by trying to compare the fact situation in the case at bar with Sherman Act cases. The difference in the statutes has been recognized by this Court in numerous cases—first by application of the original Clayton Act to cases where the specific violations of that statute could not meet the requirements of the *broad effect* needed and *difficulties of proof* under the Sherman Act—and second by application of the Robinson-Patman Act to cases which were not clearly within the prohibitions of either the original Clayton Act or the Sherman Act. *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 355, 356, 42 S. Ct. 360, 361, 66 L. Ed. 653; *Corn Products Refining Co.* v. *F. T. C.*, 324 U. S. 726, 65 S. Ct. 961, 89 L. Ed. 1320; *F. T. C.* v. *Morton Salt Co.*, 334 U. S. 37, 43, 44, 68 S. Ct. 822, 826, 827, 92 L. Ed. 1196; A. L. R. 2d 269; *Porto*

Rican American Tobacco Co. v. *American Tobacco Co.*, 30 F. 2d 234; c. d. 279 U. S. 858, 49 S. Ct. 353, 73 L. Ed. 999; Compare: *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219, 235, 236, 68 S. Ct. 996, 1005, 1006, 92 L. Ed. 1328; *U. S.* v. *Columbia Steel Co.*, 334 U. S. 495, 519, 68 S. Ct. 1107, 1120, 92 L. Ed. 1533; *Lorain Journal Co.* v. *U. S.*, 342 U. S. 143, 150 (n. 6), 152, 72 S. Ct. 181, 185, 186, 96 L. Ed. 162; *Times-Picayune Pub. Co.* v. *U. S.*, 345 U. S. 594, 609, 610, 73 S. Ct. 872, 881, 97 L. Ed. 819; *U. S.* v. *Employing Plasterers' Association of Chicago*, 347 U. S. 186, 74 S. Ct. 452, 98 L. Ed. 365. Although the recent Sherman Act cases as last compared show a recognition of the proper application of that statute to a relatively small geographical area, even more does the history and language of the Clayton Act as amended by the Robinson-Patman Act dictate the conclusion that it was specifically designed to fill that void in geographical price discrimination existing under the Sherman Act which made effective protection of the small seller so difficult.

The court below by overlooking the territorial application had great difficulty with the constitutional aspects of the Robinson-Patman Act, saying that:

> "... the wrongs complained of must involve interstate commerce, either in 'effect' or 'purpose', for obviously, the acts can have no greater potency than the commerce clause itself." (R. 328)

The Tenth Circuit Court of Appeals then erroneously concluded that local conduct, such as that court *assumed* this case to involve, *which is separable and unrelated to interstate commerce*, is necessarily "insulated" from the operation of the anti-trust laws and cites as support *U. S.* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293, 297, 65 S. Ct. 661, 663, 89 L. Ed. 951. The *Frankfort Distilleries* case *reversed* the holding of this same court below, the Tenth Circuit

Court of Appeals, in which two of the Judges in the case at bar participated. It involved a criminal prosecution for violation of the Sherman Act alleging that the defendants combined and conspired to restrain interstate trade in raising, fixing, and maintaining high retail prices for alcoholic beverages shipped into Colorado. The Tenth Circuit Court of Appeals there erroneously held that, since a retailer could not purchase from anyone but a wholesaler under Colorado law, the title vested in the wholsaler at the time it crossed the state line where it ceased to be an integral part of interstate commerce so that the sales to the retailers were wholly intrastate transactions and not violative of the Sherman Act. *Frankfort Distilleries* v. *U. S.*, 144 F. 2d 824, 834. This Court reversed the Tenth Circuit by stating in reference to the Sherman Act in *U. S.* v. *Frankfort Distilleries*, 324 U. S. 293, 297, 65 S. Ct. 661, 663, 89 L. Ed. 951 as follows :

> ". . . there is an obvious distinction to be drawn between a course of conduct wholly within a state and conduct which is an inseparable element of a larger program dependent for its success upon activity which affects commerce between the states. It is true that this Court *has on occasion* determined that local conduct could be insulated from the operation of the Anti-Trust laws on the basis of the purely local aims of a combination, insofar as those aims were not motivated by the purpose of restraining commerce, and where the means used to achieve the purpose did not directly touch upon interstate commerce. The cases relied upon by respondents fall within this category. *All* of them involved the application of the Anti-Trust laws to combinations of businessmen or workers in *labor disputes, and not to interstate commercial transactions.* On the other hand, the sole ultimate object of respondents' combination in the instant case was price fixing or price maintenance. And with reference to commercial trade restraints such as these, Congress, in passing the Sher-

> man Act, left no area of its constitutional power unoccupied; it "exercised 'all the power it possessed.'" . . . The fact that the ultimate object of the conspiracy charged was the fixing or maintenance of local retail prices, does not of itself remove it from the scope of the Sherman Act; retail outlets have ordinarily been the object of illegal price maintenance. (Emphasis added)

The *Frankfort Distilleries* case, *supra*, simply did not stand at that time for the proposition applied in the Court below except in a labor dispute type of situation, which should have been apparent had that Court not lifted a sentence out of context and disregarded the qualifying sentence that immediately followed. Whether labor situations are now an exception is questionable in view of recent decisions. *U. S. v. Employing Plasterers' Association of Chicago*, 347 U. S. 186, 74 S. Ct. 452, 98 L. Ed. 365 (Adv.); *Las Vegas Merchant Plumbers Ass'n. v. U. S.*, 210 F. 2d 732 (9th Cir. 1954). It is clear, however, that the language in *Frankfort Distilleries, supra*, at best has reference only to (1) Sherman Act cases and (2) labor disputes and not commercial transactions, and it has no reference whatsoever to the specific prohibitions of the Robinson-Patman Act. It is apparent that the Tenth Circuit Court of Appeals is straining to adhere to an erroneous conception of the Sherman Act which was reversed by this Court, and which the Court below, despite reversal, refuses to abandon and continues to try to engraft on this Robinson-Patman Act case.

The Court of Appeals finally places great reliance on a quotation from *U. S. v. Wrightwood Dairy Co.*, 315 U. S. 110, 120, 62 S. Ct. 523, 526, 86 L. Ed. 726, where this Court states that "It is the effect upon the interstate commerce or its regulation, regardless of the particular form which the competition may take, which is the test of federal power." But the Court below left out the preceding words

which specifically approve even Sherman Act power over intrastate activity when this Court said:

> "Competitive practices which are *wholly intrastate may be reached by the Sherman Act*, 15 U. S. C. A. §§ 1-7, 15 note, because of their injurious effect on interstate commerce. . . . So too the marketing of a *local product* in competition with that of a like commodity moving interstate may so interfere with interstate commerce or its regulation as to afford a basis for Congressional regulation of the intrastate activity." (Emphasis added)

In fact, the *Wright-wood Dairy* case, *supra*, held that the Agricultural Marketing Agreement Act of June 3, 1937, 50 Stat. 246, 7 U.S.C.A. § 608c, was constitutional under the commerce clause although the dairy company subjected to the Act was *wholly in intrastate commerce*. The clear language of this case requires no interpretation. And its principle applies here where the price discrimination in Santa Rosa, New Mexico, by below-cost sales while the interstate sales in Farwell, Texas, remained high brought respondent's conduct within both § 13(a) and § 13a of 15 U.S.C.A.

The Court below seems to focus only on the intrastate character of petitioner while ignoring the interstate character of respondent. In its second and third opinions the Tenth Circuit Court of Appeals found that respondent was in interstate commerce. *Moore* v. *Mead Service Co., et al.*, 190 F.2d 540, 541; *Mead's Fine Bread Co.* v. *Moore*, 208 F.2d 777, 780. (R. 329) In addition, there was ample evidence of an interstate combination of Mead owned and controlled bakeries standing athwart the Texas-New Mexico line. (R. 124, 125, 129, 131-135) This combination used a common name, a common management, a common advertising program, and a common purchasing arrangement and had interlocking directorates. (R. 135, 136, 137, 169) As a result, all of respondent's sales were of an interstate

character because respondent, itself, was acting in interstate commerce and in concert with other Mead bakeries who sold in states other than New Mexico where the price was the same as at Farwell, Texas. (R. 47, 126) Respondent's interstate character necessarily results in the "means" used here extending beyond the boundaries of one state. Even more important, respondent's particular discriminatory sales extend beyond the boundaries of one state, as respondent stipulated. (R. 131, 132)

The anachronistic decision of the Court of Appeals can probably best be explained by that Court's failure to grasp that the effect on or purpose concerning interstate commerce, which it so avidly sought but could not find, actually lay not at Santa Rosa, New Mexico, but rather on or in the territorial area of respondent's interstate character. *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U.S. 219, 232, 68 S. Ct. 996, 1004, 92 L.Ed. 1328. The Congress by passage of the Section 2 of the Clayton Act and the Robinson-Patman amendment determined that a price discrimination by one engaged in interstate commerce *necessarily* affected interstate commerce, as it must, while injuring the one in intrastate commerce. It is the cause of action given the one injured that deters or punishes the interstate wrongdoer. The Robinson-Patman Act strikes down such unlawful practices in their "incipiency". *Corn Products Refining Co.* v. *F. T. C.*, 324 U.S. 726, 738, 65 S. Ct. 961, 967, 89 L.Ed. 1336, 1332 (1945).

The forbidden effect here lies in preventing these little independent units from being "gobbled up by bigger ones". *U. S.* v. *Columbia Steel Co.*, 334 U. S. 495, 534, 68 S. Ct. 1107, 1127, 92 L. Ed. 1533. It is thus that monopoly is prevented prior to conception rather than attacked after birth. That the commerce clause gives to Congress this power has never been questioned until raised by the Court below on its third consideration of this matter. That it is with-

out substance is apparent. That it demands reversal by this Court is certain.

B. Local Price Cutting Is Prohibited Where Either The High Price Or The Low Price Leg Of The Discrimination Is In Commerce.

There are only two essential facts to bear in mind here. The first is that respondent, Mead's Fine Bread Company, was in interstate commerce as twice determined by the Court of Appeals. *Moore* v. *Mead Service Co., et al*, 190 F. 2d 540, 541; *Mead's Fine Bread Co.* v. *Moore*, 208 F. 2d 777, 780. (R. 329) The second fact is that Mead trucked bread produced at Clovis, New Mexico, to Farwell, Texas, on a regular route during the course of the price discrimination and sold that bread at wholesale for fourteen cents per pound in interstate commerce while selling the same product at Santa Rosa, New Mexico, for seven cents per pound. (R. 9, 131, 132, 144, 165, 166)

The governing words of the statute declare as unlawful a discrimination in price

> ". . . between different purchasers of commodities of like grade and quality, *where either or any of the purchases involved in such discrimination* are in commerce, where such commodities are sold for use, consumption, or resale within the United States. . ." (Emphasis added). 49 Stat. 1526; 15 U. S. C. A. § 13(a)

Accordingly, the coverage of the Act extends "to discrimination between interstate and intrastate customers, as well as those purely interstate . . . When granted to those within the State [as at bar] and denied those beyond, they [price differentials] involve . . . a directly resulting burden upon interstate commerce with the latter" Sen. Rep. No. 1502, 74th Cong. 2d Sess. (1936) 4, 5. The Tenth Circuit Court of Appeals completely disregarded the foregoing controlling words of the statute. Moreover, that court

utterly ignored the highly pertinent committee report set out above. If the Tenth Circuit had paid heed to these governing factors, it would not have fallen into the great error of its decision. Yet the Tenth Circuit's opinion does not once consider these basic, statutory words enacted by Congress.

Indeed, it is implicit in the words "price discrimination" that there be two "legs" of prices, one high and one low, *either* or both of which may be in interstate commerce. This is borne out by Webster which defines "to discriminate" as being "~~to~~ make a difference in treatment or favor (of one as compared with others) . . ." And "discrimination" is "a distinction in treatment . . . Specif. . . . a difference in treatment made between persons, localities, or classes of traffic in respect of substantially the same service." Webster's New International Dictionary, 2d Ed., unabridged (1941), G. & C. Merriam Co.

Thus, a price differential—unequal price treatment—is within the affirmative prohibitions of Section 2(a) of the amended Clayton Act and is illegal unless it can be justified by cost differences or otherwise. It should be noted that in this case there was no attempt either in the pleadings or in the evidence to bring respondent's discrimination within any of the specific justification provisos enumerated in the statute. In *Samuel H. Moss, Inc.* v. *F. T. C.* 148 F. 2d 378, 379 (2d Cir., 1945), reh. 155 F. 2d 1016 (2d Cir., 1946), c. d., 326 U. S. 734, 66 S. Ct. 44, 90 L. Ed. 437, a case similar to the case at bar in that it involved injury to sellers competing with the discriminator, the Second Circuit held that discrimination was shown by proof that "respondent sold rubber stamps to some of its customers at lower prices than it was selling the same stamps to other customers." Similarly, in *F. T. C.* v. *Morton Salt Co.*, 334 U. S. 37, 44, 68 S. Ct. 822, 827, 92 L. Ed. 1196, this Court held that the "avowed pur-

pose" of the Act was "to protect competition from all price differentials except those based in full on cost savings . . ." In other words, as this Court has put it:

> "A price discrimination is measured by the difference between the high price to one purchaser and the lower price to another." *F. T. C.* v. *A. E. Staley Mfg. Co.*, 324 U. S. 746, 757, 65 S. Ct. 971, 976, 89 L. Ed. 1338, 1346.

By command of the statute, this is true whether the price difference is accorded to competing purchasers who are usually located in the same geographical area or to non-competing purchasers located in different geographical areas, as in the case at bar. *Porto Rican American Tobacco Co.* v. *American Tobacco Co.*, 30 F. 2d 234, 236 (2d Cir., 1929), c. d. 279 U. S. 858, 49 S. Ct. 353, 73 L. Ed. 999. Indeed, the original purpose of the Clayton Act in 1914 was, and still is, to protect *sellers* competing with discriminator in a particular, local, geographical area. In both cases the statute protects the injured seller who has borne the brunt of the discriminating seller's price differential. Thus, with Mead's price cut in Santa Rosa came unlawful price discrimination in interstate commerce. This discrimination was direct, and it was, in the controlling terms of the statute, . . . *where either or any of the purchases involved in such discrimination are in commerce* . . ." (Emphasis added) 49 Stat. 1526, 15 U.S.C.A. § 13(a).

In *Corn Products Refining Co.* v. *F. T. C.* 324 U. S. 726, 65 S. Ct. 961, 89 L. Ed. 1320, as in the case at bar, territorial price differentials were involved. There petitioner was in interstate commerce having plants in both Chicago and Kansas City for the manufacture of glucose, but, even though deliveries were made from the Kansas City factory, the freight from Chicago was added. This discrimination most benefited the purchases made by the Curtiss Candy

Company which was located in Chicago. Although Curtiss itself was in interstate commerce and in competition with all manufacturers of one and five cent candy bars, in answer to the allegation that, if the sales to Curtiss were *not* in interstate commerce, application of the Robinson-Patman Act to them would be unconstitutional, and that in any case such sales did not affect commerce, this Court said:

> "Moreover, some of petitioner's sales to other companies, to whom these allowances were not accorded the [high-price leg], were made in interstate commerce; thus there was a discrimination against sales in interstate commerce, well within the power of the Commission to remedy." *Ibid.*, 324 U. S. 744, 745, 65 S. Ct. 961, 970, 89 L. Ed. 1320.

This statement is in absolute accord with the intent of Congress, for Representative Utterback, manager of the bill in the House, followed the lead of the Senate committee, and foreshadowed the *exact* case at bar, in explaining that local price cutting by a company in selling outside the state as well as locally was within the Act's prohibitions when he said:

> "Where, however, a manufacturer sells to customers both within the State and beyond the State, he may not favor either to the disadvantage of the other; he may not use the privilege of interstate commerce to the injury of his local trade, *nor may he favor his local trade to the injury of his interstate trade.*" (Emphasis added) 80 Cong. Rec. (1936) 9559.

In the *Corn Products* case, *supra*, the sales at Chicago to the Curtiss Candy Company, also in Chicago, were *intrastate and purely local* and ~~represented the low price leg of~~ the discrimination because other sales had the freight from

Chicago added regardless of the place of production, so that sales from Kansas City would be in the high-price leg. Thus, the local sales in Chicago necessarily were favored, just as Mead favored local sales at Santa Rosa in the case at bar. In the instant case the low-price leg of the discrimination was intrastate at Santa Rosa, New Mexico, while the high-price leg was in interstate commerce going from New Mexico into Texas. Since it cannot be questioned that the sales in Texas were in interstate commerce, the discriminatory acts of the respondent corporation are clearly within the words ". . . where either or any of the purchases involved in such discrimination are in commerce. . . ." 49 Stat. 1526, 15 U.S.C.A. §13(a).

The decision of the Court of Appeals even conflicts with the decision of the Second Circuit in *Porto Rican American Tobacco Co.* v. *American Tobacco Co.*, 30 F. 2d 234 (2d Cir., 1929), cd. 279 U.S. 858, 49 S. Ct. 353, 73 L.Ed. 999, which occurred prior to the insertion of the amendatory words, above quoted, of the Robinson-Patman Act. The Porto Rican company brought a suit asking for an injunction against a price discrimination practice of the American Tobacco Co. in the sale of Lucky Strike cigarettes within the island of Porto Rico. The Porto Rican company manufactured and sold its cigarettes wholly within Porto Rico to wholesalers and jobbers who in turn retailed them for not more than twelve cents per package. Lucky Strikes were manufactured in the United States and imported into Porto Rico and sold for fifteen cents. The Porto Rican Legislature increased the tax on cigarettes, so that Lucky Strikes necessarily would retail at eighteen cents whereas the Porto Rican brands remained unchanged. About two weeks after the tax increase went into effect, American cut the price of Lucky Strikes to twelve cents a package, which would cause it a loss of some $140,000 per year. As a result Porto Rican had to lower its price to ten cents, bare factory cost,

causing it a loss of $150,000 to $180,000 per year. Injunctive relief was granted, the Court saying:

> "The appellant could stand this competition in this price warfare. Its sole business in Porto Rico was the sale of 'Lucky Strikes', and this was about one half of 1 per cent of its entire 'Lucky Strikes' business throughout the world. A loss there would not impair its financial stability, but the appellee could not so compete. Such price cutting to capture the market, by eliminating the appellee therefrom, is prohibited by the provisions of the Clayton Act. It was foreign to any legitimate commercial competition." *Ibid.*, 237.

Porto Rican's sales were strictly local and, just as in the case of Mead's, represented the low-price leg. The high-price leg was in the United States. It is plain that interstate commerce in the United States was burdened with the high-price leg. The Second Circuit squarely held that differentials in price between *non-competing* purchasers, "those of the United States and of Porto Rico," violated Section 2 of the Clayton Act because the plaintiff, as a seller competing with the discriminator, was injured. *Ibid.*, 30 F. 2d 234, 236. The injury resulted from the price cut established by the defendant in Porto Rico while normal prices were maintained in the United States. Both in our case and in the *Porto Rican* case the low-price leg of the discriminator's sales occurred in competition with the local sales of the injured competitor.

It is apparent that the Court of Appeals has failed to recognize that Congress by use of the word "discrimination" in Section 2(a) of the amended Clayton Act meant a bundle or unit consisting of two price legs, one high and one low. It is the relationship between the low-price and high-price legs that constitutes the discrimination. One cannot isolate either price leg and give effect to the intent of the statute. Proof that a seller has charged one pur-

chaser a higher price than another—at least two sales at a different price—is a "discrimination" under the statute. *F. T. C.* v. *Morton Salt Co.*, 334 U.S. 37, 45, 68 S. Ct. 822, 827, 828, 92 L.Ed. 1196; *Bruce's Juices* v. *American Can Co.*, 330 U.S. 743, 755, 67 S. Ct. 1015, 1021, 91 L.Ed. 1219; *F. T. C.* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746, 757, 65 S. Ct. 971, 976, 89 L.Ed. 1338; *Corn Products Refining Co.* v. *F. T. C.*, 324 U.S. 726, 738, 739, 65 S. Ct. 961, 967, 89 L. Ed. 1320; *Porto Rican American Tobacco Co.*, 30 F.2d 234, 237, c.d., 279 U.S. 858, 49 S. Ct. 353, 73 L.Ed. 999. There being a price discrimination—sales of bread at seven cents a pound in New Mexico compared to fourteen cents a pound interstate into Texas—and one leg being in interstate commerce—the commerce requirements of the statute are fully met—"where either or any of the purchases . . . are in commerce . . ." 49 Stat. 1526, 15 U.S.C.A. (13(a); 37 Geo. L. J. 217. Respondent's conduct is a blatant violation of the unambiguous words of the Robinson-Patman Act. The decision of the Court of Appeals should be reversed.

C. Injury To A Wholly Intrastate Competitor By An Interstate Corporation's Discriminatory Price Cutting Constitutes a Direct Violation Of The Robinson-Patman Act.

The previous discussion of the legislative history of the Robinson-Patman Act reflects the steps which Congress took to strengthen the Clayton Act. As stated heretofore, one of the most significant of such steps was to afford protection to an individual seller upon showing of injury to himself alone. Rather than injury to competition in general, "the more immediately important concern is in injury to the *competitor* victimized by the discrimination." (Emphasis added). Sen. Rep. 1502, 74th Cong., 2d Sess. (1936) 4; *F. T. C.* v. *Morton Salt Co.*, 334 U.S. 37, 49, (n. 18), 68 S. Ct. 822, 830, 92 L.Ed. 1196, 1206 (1948). Thus, in 1936, Congress supplemented the original Clayton Act's prohibition of discrimination which "lessen competition" by the addi-

tion of the italicized words in the qualification clause which follows:

> ". . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, *or to injure, destroy, or prevent competition with any person who . . . grants . . . such discrimination . . .* " (Emphasis added) 49 Stat. 1526; 15 U.S.C.A. § 13(a).

In the case at bar it is Mead's Fine Bread Company which "grants . . . such discrimination . . . " 49 Stat. 1526, 15 U.S.C.A. § 13(a). And the respondent corporation concededly was in competition with petitioner, L. L. Moore. Hence, petitioner was in the direct line of the injury from respondent's price cut.

Petitioner's bread business was wholly intrastate. A small amount of cakes which he had for resale were shipped from California (R. 68, 122). It is undisputed however, that Mead shipped bread from New Mexico to Texas on regular routes and sold it at its regular price in this interstate commerce during the period of the price discrimination (R. 131, 132, 165, 47). Further, Mead's Fine Bread Company was a part of an interstate combine of corporations which did business in both New Mexico and Texas (R. 124, 125, 129, 131-135). This combine jointly purchased materials and supplies outside of New Mexico which were shipped interstate to the particular bakery needing them (R. 136, 169). Moreover, the Court of Appeals has twice found that Mead was in fact engaged in selling in interstate commerce. *Moore* v. *Mead Service Co., et al.*, 190 F. 2d 540, 541; *Mead's Fine Bread Co.* v. *Moore*, 208 F. 2d 777, 780 (R. 329).

There can be no argument about the facts of the price discrimination. The respondent corporation admitted that it cut the price of bread at Santa Rosa, New Mexico, to

seven cents per pound loaf while its price elsewhere was fourteen cents (R. 9). Similarly, in Santa Rosa the price of a pound and a half loaf was cut by Mead from twenty-one to eleven cents (R. 165, 166). The price was not cut anywhere else (R. 165). This price cut was considerably below the cost of production and sales (R. 166). And it was maintained from September 3, 1948, until April 26, 1949 (R. 164, 166), although the original excuse for it vanished the first day, for all practical purposes (R. 91, 92). It is noted that this action was commenced on March 10, 1949 (R. 1, No. 362, October Term 1951). It cannot be controverted that petitioner, L. L. Moore, was driven to the wall, bankrupted and destroyed as a competitor as a result of respondent's drastic price discrimination (R. 56, 57, 58). Petitioner, having lost his bakery, now drives a gasoline truck (R. 39).

Upon these basic facts and under its strange conception of the law, the Court of Appeals stated:

> "But there is positively no evidence that the discriminatory sales had even the probable effect of lessening competition or tended to create a monopoly . . . or to destroy or prevent competition with Mead at any place except Santa Rosa . . . If competition was lessened or a monopoly created, it was purely local in its scope and effect and in no way related to or affected interstate commerce." *Mead's Fine Bread Co.* v. *Moore*, 208 F. 2d 777, 780 (R. 329).

Yet, in the same paragraph, the Court below states that "The suppressive effect [s] . . . on competition at Santa Rosa, *reprehensible* as they may have been . . ." did not reach beyond New Mexico and so is not within Section 13(a). (Emphasis added) *Ibid.* In the light of the history of the Robinson-Patman Act, surely "reprehensible" price discrimination by a discriminator who is clearly within the

words of the Act necessarily must have one of the forbidden effects or else this statute is useless and fails entirely to meet the ends that Congress so clearly intended. More especially is the violation and injurious effect apparent where the competitor is *completely eliminated* as here.

The injury sustained by L. L. Moore, the petitioner, is the prohibited injury specifically contemplated by the statute. Contrary to the opinion of the Tenth Circuit, it is of *no* significance whatsoever under Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, that petitioner is not engaged in interstate commerce *so long as respondent is*. Under the statute discriminatory injury to this local individual is illegal.

Price discriminations of the degree here practiced could have but one effect even if such were used in only one retail outlet—bread at half price is too tempting a morsel for either the poor or the rich to ignore. Bread at this price will be bought, and it will be bought to the exclusion of that made by the honest baker. It is as said in *F. T. C.* v. *Morton Salt Co.*, 334 U.S. 37, 50, 51, 68 S. Ct. 822, 830, 92 L. Ed. 1196, 1206 (1948):

> ". . . we believe [it] to be self-evident . . . that there is a 'reasonable possibility' that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of those customers."

Such practice as here found is "foreign to any legitimate commercial competition." *Porto Rican American Tobacco Co.* v. *American Tobacco Co.*, 30 F. 2d 234, 237 (2d Cir., 1929), c. d. 279 U. S. 858, 49 S. Ct. 353, 73 L. Ed. 999. Even more so is half-price "unreasonably low" and the destruction or elimination of a competitor certain within the provisions of the companion section of the Robinson-Patman

Act enacted under the sponsorship of Senators Borah and Van Nuys (15 U. S. C. A. § 13a). If this case had finally been tried before petitioner's business demise, there would have been strong support for a finding of injury to petitioner. But, after his financial death, there is nothing more an autopsy could show. Actual destruction by price discrimination, as here, must be illegal, per se. Yet the statute, Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, *only* requires that the price discrimination *may have had one of the prohibited effects.* Thus if this competitor was injured—and indeed he was—a forbidden effect exists under the plain language of the statute. *F. T. C.* v. *Morton Salt Co.*, 334 U. S. 37, 45, 46, 47, 68 S. Ct. 822, 827, 828, 92 L. Ed. 1196, 1204 (1948); *Corn Products Refining Co.* v. *F. T. C.*, 324 U. S. 726, 738, 742, 65 S. Ct. 961, 967, 969, 89 L. Ed. 1320, 1332, 1334 (1945).

The Court below sees in the Robinson-Patman Act a requirement that the injury must be to one whose business is in some way related to interstate commerce. *Mead's Fine Bread Co.* v. *Moore*, 208 F. 2d 777, 780 (R. 329). This is to say that one in interstate commerce may destroy a wholly intrastate competitor with impunity. Manifestly, the words of the statute permit no such implication, and it is contrary to the legislative history of the Act. If it were so, then the Second Circuit was in grave error in *Porto Rican American Tobacco Co.* v. *American Tobacco Co. supra*, because even under the *original* Clayton Act that court enjoined price-cutting affecting an entirely local competitor. See also *Greenleaf* v. *Brunswick-Balke-Collender Co.*, 79 F. Supp. 362 (D. C., E. D. Pa.); *Midland Oil Co.* v. *Sinclair Refining Co.*, 41 F. Supp. 436 (D. C., N. D. Ill.); *Reid* v. *Doubleday & Co., Inc.*, 109 F. Supp. 354 (N. D. Ohio, W. D.). Furthermore, it is significant that even under the Sherman Act the fact that a plaintiff is in interstate commerce is *immaterial*

if the defendant is. *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U. S. 390, 27 S. Ct. 65, 51 L. Ed. 241; *C. E. Stevens Co. v. Foster & Kleiser Co.*, 311 U. S. 255, 61 S. Ct. 210, 85 L. Ed. 173. It is obvious that, where a discriminator is in interstate commerce and violates the specific prohibitions of the Robinson-Patman Act, the persons injured, regardless of their commerce character, can recover (See Section 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. A. § 15).

Farther, respondent's interstate character necessarily reaches beyond the boundaries of New Mexico, so that whenever a competitor is injured or eliminated there is a concomitant benefit to respondent. The benefit to respondent in turn has an effect on interstate commerce which Congress by adopting the Robinson-Patman Act declared detrimental. How it is possible to segregate a particular "means" used by one in interstate commerce or to pick out one from the bundle of privileges inherent in the use of interstate commerce and say, "This one did it," this petitioner cannot say: If respondent is in interstate commerce and "The facts . . . read upon the literal language the statute," (R. 329) that should be sufficient because Congress' power over that commerce is plenary. *Shreveport Rate Cases*, 234 U. S. 342, 34 S. Ct. 833, 58 L. Ed. 1341; *Rd. Com. of Wisc. v. C. B. & Q. R. R.*, 257 U. S. 563, 42 S. Ct. 232, 66 L. Ed. 371. The words of the Honorable Harlan Fiske Stone while an Associate Justice of the United States Supreme Court are directly apposite here:

> "The power of Congress to regulate interstate commerce is *plenary* and extends to all such commerce be it great or small. Hanley v. Kansas City S. R. Co., [187 U. S. 617, 47 L. Ed. 333, 23 S. Ct. 214] *supra*. The exercise of congressional power under the Sherman Act, . . . the *Clayton Act*, . . . the Federal Trade Commission Act, . . . or the National Motor

> Vehicle Theft Act, . . . has never been thought to be constitutionally restricted because in any particular case the volume of commerce affected may be small." (Emphasis added) *N. L. R. B.* v. *Fainblatt*, 306 U. S. 601, 606, 59 S. Ct. 668, 671, 672, 83 L. Ed. 1014, (1939).

The suppressive effect on commerce by the interstate combine of corporations here involved is also apparent. If they can pick off and eliminate local competitors, as they did petitioner, monopoly and the destruction of competition will be the result. Intrastate sales only, together with the interstate combine's wrongful purpose, probably would be sufficient. See *F. T. C.* v. *Cement Institute*, 333 U. S. 683, 695, 696, 68 S. Ct. 793, 800, 92 L. Ed. 1010. However, if the Court of Appeals is correct in this case, then the method for avoidance of the Robinson-Patman Act is defined—simply incorporate in each state and not let the low-price leg of the sales cross a state line. Petitioner does not believe that Congress intended this statute to be a nullity. It means what it says. This petitioner has satisfied every element of the Act's requirements and is entitled to its protection. Nebulous speculation on the meaning of the plain words of the Robinson-Patman Act should not be permitted to cloud recovery in a case as clear as this. The decision of the Court of Appeals should be reversed.

D. No Proof Of Intent Is Required Under The Robinson-Patman Act.

While there was ample evidence at bar to justify a finding under the general verdict that Mead specifically intended to injure petitioner (R. 176-178, 181-183), such evidence is not necessary to sustain the judgment of the District Court under Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

It is axiomatic that Section 2 of the Clayton Act, as

amended by the Robinson-Patman Act, does *not* require a plaintiff to show that a price-cutting defendant had any purpose or intent to injure a competitor. The act of discriminating in price is illegal, regardless of any state of mind. Neither Section 2 of the original Act, nor its amended form, requires purpose or intent to be shown in order to prove a violation.

In 1914 as finally passed after conference committee agreement, the words ". . . with the purpose or intent thereby to destroy or wrongfully injure the business of a competitor, or either such purchaser or seller . . ." were stricken from the original House bill. Not only has the enactment never contained the elements of purpose or intent, but Congress made its legislation doubly clear by eliminating such language from the original House bill. Sen. Doc. No. 584, 63rd Cong., 2d Sess. (1914) 4. The Robinson-Patman amendment did not change the statute in this respect, and the act of discrimination remains illegal regardless of purpose or intent. 49 Stat. 1526, § 1; 15 U. S. C. A., § 13; *F. T. C. v. Morton Salt Co.*, 334 U. S. 37, 45, 68 S. Ct. 822, 827, 828, 92 L. Ed. 1196, 1203 (1948).

II. ON SECOND APPEAL, AFTER A NEW TRIAL ON IDENTICAL ISSUES OF LAW AND FACT AND SUBSTANTIALLY THE SAME EVIDENCE, WHERE THIS COURT HAS GRANTED CERTIORARI ONCE AND DENIED IT ONCE, ISSUES OF LAW AND FACT WHICH NECESSARILY WERE INVOLVED, CONSIDERED AND DETERMINED ON THE PRIOR APPEAL SHOULD NOT, UNDER THE DOCTRINE OF "LAW OF THE CASE," BE RECONSIDERED.

The most recent of the three opinions of the Court of Appeals in this case is all the more amazing because it resurrects issues long ago laid to rest. After two trials on identical issues of law and fact, and on substantially the same evidence, the Court of Appeals had a golden opportunity to

apply the doctrine of "law of the case." *Barney* v. *Winona & St. P. R. Co.*, 117 U. S. 228, 6 S. Ct. 654, 29 L. Ed. 858; *City and County of Denver* v. *Denver Tramway Corp.*, (10th Cir.), 23 F. 2d 287, c. d., 278 U. S. 616, 49 S. Ct. 20, 73 L. Ed. 539; *State of Kansas* v. *Occidental Life Ins. Co.*, (10th Cir.), 95 F. 2d 935, c. d., 305 U. S. 603, 59 S. Ct. 63, 83 L. Ed. 383. Although a decision of a court of appeals is not ordinarily law of the case in this Court, *Messinger* v. *Anderson*, 225 U. S. 436, 32 S. Ct. 739, 56 L. Ed. 1152; *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U. S. 251, 36 S. Ct. 269, 60 L. Ed. 629, it is submitted that the peculiar history of this action tends to bring it within that rule.

In the first trial the complaint was dismissed at the conclusion of petitioner's case in chief, on grounds of justification under certain exceptions in the Robinson-Patman Act. The Court of Appeals, 184 F. 2d 338, affirmed on the ground that the petitioner was in *pari delicto*, and this Court, granting certiorari, 340 U. S. 944, 71 S. Ct. 528, 95 L. Ed. 681, remanded the case to the Court of Appeals for reconsideration in the light of *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons*, 340 U. S. 211, 71 S. Ct. 259, 96 L. Ed. 219, handed down at the same term. Acting upon this mandate, the Court of Appeals reversed itself and the District Court and sent the case back for a new trial, 190 F. 2d 540. The defendant then sought certiorari, which was denied, 342 U. S. 902, 72 S. Ct. 280, 96 L. Ed. 675.

This Court thus has had two prior opportunities to consider whether the petitioner pleaded and proved a prima facie case in the first trial. When certiorari was granted, the per curiam memorandum and mandate did not decide any specific issues, but by calling attention to the *Kiefer-Stewart Co.* case this Court certainly pointed the way for the Court of Appeals. In view of this, denial of certiorari after the Court of Appeals reversed itself and the District

Court must be given more significance than it otherwise would. It was tacit approval of the decision presented for review and of the way this Court's mandate had been obeyed.

Out of the plethora of cases in which this Court has told the bar that a denial of certiorari imports no expression of opinion on the merits of the case (e. g., *Sunal* v. *Large*, 332 U. S. 174, 67 S. Ct. 1588, 91 L. Ed. 1982), counsel has found not one in which the judicial history paralleled the one at bar, or in which there are such compelling reasons for qualifying the oft-stated rule denying significance to a denial of certiorari. It stands to reason that, after granting certiorari once and remanding the case for reconsideration in the light of a specific case, this Court would have reviewed the second decision of the Court of Appeals had it been contrary to the mandate.

Clearly, if this Court had reversed the Court of Appeals after granting certiorari the first time and had sent the case back to the District Court for a new trial, and it had come up again on substantially the same evidence and issues of fact and law, the "law of the case" doctrine would have prevented reconsideration of such basic questions as whether the acts complained of had the requisite effect on commerce and upon a competitor to come within the Robinson-Patman Act. *Barney* v. *Winona & St. P. R. Co.*, *supra*, 117 U. S. 228, 6 S. Ct. 654, 29 L. Ed. 858. If the petitioner had not pleaded and proved a prima facie case before the first appeal, this Court could have denied certiorari, or, having granted it due to the necessity of correcting a serious error by the Court of Appeals on an important question of federal law, could have disposed of the case summarily on the other grounds.

The action of this Court in remanding the case for further consideration indicated clearly that it did not agree

with the erroneous first decision of the Court of Appeals that the petitioner must be denied relief because he was in *pari delicto*. In so doing this Court of necessity considered the questions presented by the record and briefs of the parties. Reference is made to Part IV and Part V of respondent's brief replying to petitioner's original petition for certiorari, the headings of which are, respectively, "The Dispute Involved Is of a Local Character and Had No Impact Upon Interstate Commerce," and "There Must Be a Showing That a Price Discrimination May Substantially Have the Effect of Lessening, Injuring, Destroying or Preventing Competition or Tend to Create a Monopoly." These points were pleaded and argued by respondent at every opportunity in both trials and appeals.

By the great weight of authority, questions which might have been, but were not, raised or presented on a prior appeal will not be considered on a subsequent appeal. *The Santa Maria*, 10 Wheat. 442, 6 L. Ed. 361; *Washington Bridge Co.* v. *Stewart*, 3 How. 413, 11 L. Ed. 658; *Tyler* v. *Maguire*, 17 Wall. 281, 21 L. Ed. 583; *The Lady Pike (Pearce* v. *Germania Ins. Co.)*, 96 U. S. 461, 24 L. Ed. 672; *United States Trust Co.* v. *New Mexico*, 183 U. S. 535, 22 S. Ct. 172, 46 L. Ed. 315. But here the questions now involved were presented and argued on the prior appeal and were necessarily involved, considered and determined by this Court in arriving at its decision to remand the case for further consideration, especially since the *Kiefer-Stewart Co.* case to which the the Court of Appeals was referred dealt only with one specific matter, that is, whether the doctrine of *pari delicto* had any application to an action for damages under the anti-trust laws.

At the second trial, under the "law of the case" stemming from the Tenth Circuit's opinion at 190 F. (2d) 540, the District Court would have been justified in directing the

jury to find for the petitioner on the commerce issues. Instead, it submitted them on meticulous instructions (R. 227-236, 242, 243) with which the Court of Appeals found no fault (R. 327, 328), and the jury found all issues for the petitioner. It would have been utterly meaningless and useless and a waste of time and money to send this case all the way back to the District Court for a new trial if the petitioner had not pleaded and proved a prima facie case in the first one. Petitioner challenges respondent to point out any substantial difference in the evidence adduced at the two trials, aside from the strengthening addition of the petitioner's evidence on the interstate character of respondent's combination with other bakeries, or to show wherein respondent rebutted petitioner's prima facie case.

III. THE JUDGMENT OF THE DISTRICT COURT SHOULD BE REINSTATED SINCE THERE IS NO GROUND FOR REVERSING THAT JUDGMENT.

In *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons*, 340 U. S. 211, 71 S. Ct. 259, 95 L. Ed. 219 (1951), and in *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 51 S. Ct. 248, 75 L. Ed. 544 (1931), two antitrust actions, the Court examined assignments of error not decided by the courts of appeals for the circuits and affirmed the judgments of the district courts.

At bar the respondent's reply to the petition for certiorari sets forth assignments of error which in their essentials are simply that the damages are excessive and that respondent should be excused from its illegal discrimination on some theory of justification. These are simple questions of law answered by the decisions of this Court cited immediately hereinabove and by the second decision of the Tenth Circuit Court of Appeals herein (190 F. 2d 540), among others.

This cause has been twice tried, the trial court having been found to be in error in the first instance. This cause has been the subject of three appellate opinions in the Tenth Circuit, two of which have been erroneous and one correct after directions from this Court. It seems clear that this is a perfect case in which to employ the procedure followed in the *Kiefer-Stewart* and *Story Parchment* cases. Other cases involving the antitrust laws in which the Supreme Court has directly affirmed the District Court's judgment in favor of the plaintiff after a reversal by the Circuit Court include *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251, 66 S. Ct. 574, 90 L. Ed. 652, and *Thomsen* v. *Cayser*, 243 U. S. 66, 37 S. Ct. 353, 61 L. Ed. 597.

The *Story Parchment* case goes much further than we ask the Court to go here. That case was also a private action brought under the antitrust laws where the jury brought in a verdict for plaintiff. On appeal to the circuit court, 37 F. 2d 537 (1st Cir. 1930), the judgment was vacated with directions to enter judgment for the defendants on the sole ground that the plaintiff had not sustained the burden of proving recoverable damages. Eight other assignments of error were urged before the circuit court but were not discussed. These questions were neither argued nor briefed before the Supreme Court. The Court, however, considered all of them and thereafter reinstated the jury verdict.

It is therefore submitted that this Court should remand the case at bar to the District Court with instructions reinstating the jury verdict and the judgment there entered.

Conclusion

The petitioner has pleaded and proved a classic case of geographic price discrimination under the Robinson-Patman Act, through which the Congress has exercised to the full its plenary power over commerce. In reversing the

judgment of the District Court, the Court of Appeals engrafted on the law requirements not found therein or intended by the Congress, disregarded the law of the case, and substituted its own findings of fact for those of the jury.

The decision of the Court of Appeals should be reversed. The judgment of the District Court should be affirmed. For the reasons stated herein, we respectfully urge the Court to remand this cause to the District Court with instructions reinstating the jury verdict and the judgment there entered.

Respectfully submitted,

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